Duquesne Law Review

Volume 30 | Number 2 Article 13

1992

International Law - Civil Rights

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INTERNATIONAL LAW—CIVIL RIGHTS—The United States Supreme Court held that Title VII does not apply extraterritorially to regulate employment practices of United States employers who employ United States citizens abroad.

EEOC v Arabian Am. Oil Co., US , 111 S Ct 1227 (1991).

On March 26, 1991, the Supreme Court of the United States handed down a decision which prevents United States citizens employed by United States employers from invoking the protections of Title VII of the Civil Rights Act of 1964 if such employee was discriminated against while outside the territorial jurisdiction of the United States.[1]

The petitioner, Ali Salim Boureslan, (hereinafter "Boureslan") is a Moslem and naturalized United States citizen who was born in Lebanon. The respondents are two Delaware corporations, Arabian American Oil Company (hereinafter "ARAMCO") and its subsidiary ARAMCO Service Company (hereinafter "ASC").[2] ARAMCO has its principal place of business in Dhahran, Saudi Arabia.[3] ASC has its principal place of business in Houston, Texas.[4]

In July of 1979, Boureslan was hired as an engineer by ASC.[5] After working in Houston as a cost engineer for approximately sixteen months, Boureslan was transferred to Dhahran, Saudi Arabia at his own request.[6] In June of 1984, Boureslan was dismissed from ARAMCO.[7]

Following his dismissal, Boureslan filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter "the EEOC").[8] Boureslan also instituted a suit in the United States District Court for the Southern District of Texas

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1. *EEOC v Arabian Am. Oil Co.*, 111 S Ct 1227, 1229 (1991) (hereinafter "ARAMCO").

2. *ARAMCO*, 111 S Ct at 1230.

3. Id.

4. Id.

5. Id.

6. Id.

7. *Boureslan v ARAMCO, Arabian Am. Oil Co. and ARAMCO Serv. Co.*, 857 F2d 1014 (5th Cir 1988). Shortly after beginning work in Saudi Arabia, Boureslan began having altercations with his supervisor. According to Boureslan, the altercations were the result of a "campaign of harassment" which the supervisor initiated—a campaign which took the form of racial, religious, and ethnic slurs and which culminated in Boureslan's termination on June 16, 1984. Id.

8. *ARAMCO*, 111 S Ct at 1230.

against ARAMCO and ASC.[9] Boureslan sought relief under both state law and Title VII of the Civil Rights Act of 1964[10] on grounds that he was harassed and ultimately discharged by the respondents on account of his race, religion, and national origin.[11]

The respondents filed a motion for summary judgment, claiming that the district court lacked subject matter jurisdiction over Boureslan's claims because Title VII's protections do not extend to United States citizens employed abroad by American employers.[12] The district court granted the respondents' motion for summary judgment and dismissed Boureslan's Title VII claim.[13] The district court also dismissed Boureslan's state claim for lack of pendent jurisdiction.[14] The district court then entered final judgment in favor of respondents.[15]

A panel for the Fifth Circuit Court of Appeals affirmed.[16] After vacating the panel's decision and rehearing the case en banc, the Fifth Circuit Court of Appeals affirmed the district court's dismissal of Boureslan's complaint.[17]

The EEOC, having primary responsibility for enforcing Title VII, joined with Boureslan in petitioning the Supreme Court for a writ of certiorari after the Fifth Circuit Court of Appeals affirmed[18] the district court's grant of summary judgment in favor of

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9. *Boureslan v ARAMCO, Arabian Am. Oil Co. and ARAMCO Serv. Co.*, 653 F Supp 629 (1987). Plaintiff was first employed as an engineer for ASC in Texas beginning July of 1979. In November of 1980, plaintiff was transferred to work for ARAMCO in Saudi Arabia. Plaintiff's troubles began in September of 1982, when plaintiff's supervisor allegedly began harassing plaintiff about his national origin, race and religion. Plaintiff's status deteriorated, eventually resulting in termination on June 16, 1984. Plaintiff invoked federal jurisdiction under 42 USC § 2000(e), but alleged causes of action based on state law in addition to his Title VII claim. Id.

10. 42 USC § 2000 et seq.

11. See note 7.

12. *Boureslan*, 653 F Supp 629 (1987). ARAMCO and ASC answered the complaint, denied its allegations on the merits, and moved to dismiss it under FRCP 12(b)(1) for lack of subject matter jurisdiction. The respondents argued that Title VII has no extraterritorial application to employment practices by American employers outside the United States. Id.

13. *ARAMCO*, 111 S Ct at 1230.

14. Id. Whether a federal court will hear and determine a state law claim if it dismisses the federal claim, and thus be without an independent jurisdictional basis for proceeding with the adjudication of the suit, is discretionary with the district court. *United Mine Workers of Am. v Gibbs*, 383 US 715, 726 (1966).

15. *ARAMCO*, 111 S Ct at 1230.

16. *Boureslan*, 857 F2d at 1015. The court concluded that the rules of statutory construction do not permit the court to say that Congress, through the legislative language or history, clearly expressed its intent that Title VII be applied extraterritorially. Id.

17. *Boureslan v ARAMCO, Arabian Am. Co. and Aramco Serv. Co.*, 892 F2d 1271 (5th Cir 1990).

18. *Boureslan*, 892 F2d 1271 (1990). The second agency is the Department of Justice.

ARAMCO.[19] The United States Supreme Court granted certiorari to determine whether Title VII applies extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad.[20] Both parties conceded that the Congress of the United States has the authority to enforce its laws extraterritorially.[21] The Court determined that the issue in this case, whether a sufficient showing of congressional intent to apply Title VII extraterritorially was shown, was one of statutory construction.[22]

The Court addressed the issue by stating that a presumption exists against extraterritorial application of United States laws.[23] In support of this position the Court cited *Foley Bros. v Filardo*.[24] The purpose of this presumption is to protect the interests of the United States against unintended clashes between United States laws and the laws of foreign countries which may result in international discord.[25] The Supreme Court thereby required that the pe-

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19. *Boureslan*, 653 F Supp 629 (1987).

20. *ARAMCO*, 111 S Ct at 1230.

21. Id; *Foley Bros., Inc. v Filardo*, 336 US 281 (1949). See note 23.

22. *ARAMCO*, 111 S Ct at 1230.

23. Id. *Foley Bros.*, 336 US at 285. In order to determine the issue of whether the Eight Hour Law, 40 USC § 324 (1912) (repealed by the Act of Aug. 13, 1962, § 203, Pub L No 87-851, 76 Stat 360), which provides that every contract to which the United States is a party shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract shall be required or permitted to work more than eight hours in any one day unless he is compensated at the rate of one and one-half times the basic rate of pay for all work in excess of eight hours per day, applies to a contract between the United States and a private contractor for construction work in a foreign country. The Supreme Court held that the legislation of Congress, absent a contrary intent, is meant to apply only within the territorial jurisdiction of the United States. Id.

24. 336 US 281 (1949). See note 23. The rule of construction to be used in determining extraterritorial application of a law is whether the language in the relevant act gives any indication of a congressional intent to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control. *Foley Bros*, 336 US at 285. The standard by which we must measure Boureslan's arguments is: "An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose." Id at 281, 286.

25. *ARAMCO*, 111 S Ct at 1230. See *McCulloch v Sociedad Nacional de Marineros de Honduras*, 372 US 10 (1963). The issue before the Court in *McCulloch* was whether Congress intended the National Labor Relations Act, 29 USC §§ 151-68 (1958) (cited sections amended in 1959, 1970, 1974, 1975, 1978, 1980, 1982, and 1984), to apply overseas. *McCulloch*, 372 US at 19. In order to protect against unintended clashes between the laws of the United States and those of other nations which could result in international discord, the Court held that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. Id at 21. See also *Benz v Compania Naviera Hidalgo, S. A.*, 353 US 138 (1957). At issue in *Benz* was whether the Labor Management Relations Act of 1947 applies to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign

titioners, as the parties seeking extraterritorial application of the laws, carry the burden of proof in overcoming this presumption against extraterritorial application of the law.[26]

The petitioner contended that the language of Title VII evinces the clear intent of Congress to apply Title VII extraterritorially.[27] The petitioner based their contentions on the broad definition of the jurisdictional terms "employer"[28] and "commerce"[29] in Title VII and on the statute's "alien exemption"[30] provision.[31] The petitioner further asserted that since Title VII defines "States" to include states, the District of Columbia, and specified territories, the clause must refer to areas beyond the territorial jurisdiction of the United States.[32]

The respondents made several alternative explanations for the expansive language of the statute, arguing that the phrase in the

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articles while the vessel is temporarily in an American port. The Court held that where the possibility of international discord is evident, the Court cannot read extraterritorial application into a statute. *Benz*, 353 US at 147. There must be present the affirmative intent of Congress clearly expressed. Id at 146. Because foreign applicability was not specified, the Court could not read into the Labor Management Relations Act an intent to change the contractual provisions between the United States and the foreign nations. Id at 142. To do so would interfere with the delicate field of international relations. Id at 146. Only Congress has the facilities necessary to make important policy decisions where the possibilities of international discord are so evident and retaliatory action so certain. Id.

26. *ARAMCO*, 111 S Ct at 1230.

27. Id.

28. An "employer" is subject to Title VII if it has employed fifteen or more employees for a specified period and is "engaged in an industry affecting commerce." 42 USC § 2000e(b).

An industry affecting commerce is any activity, business or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, LMRDA, 29 USC § 401 et seq.

ARAMCO, 111 S Ct at 1231, quoting 42 USC § 2000e(h).

29. "Commerce" is defined as

> trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

42 USC § 2000(e)(g).

30. The "alien exemption" provision states:

> This subchapter [42 USC § 2000e et seq] shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 USC § 2000e-1.

31. *ARAMCO*, 111 S Ct at 1233.

32. Id at 1231.

definition of commerce, "or between a State and any place outside thereof"[33] provides the jurisdictional nexus for "commerce"[34] that is not wholly within a single state.[35] The petitioners further asserted that since no mention of commerce with foreign nations was made, Congress cannot be said to have intended the statute to be applied extraterritorially.[36] The respondents supported their argument by pointing to Title II of the Civil Rights Act of 1964, which specifically defines commerce as it applies to foreign nations.[37] The respondents continued by saying that the terms "foreign commerce" and "foreign nations" were in the draft of the bill passed by the House of Representatives, but these words were deleted by the Senate prior to passing the Civil Rights Act of 1964, thereby showing that Congress had considered the issue but decided against extraterritorial application of Title VII.[38]

The Supreme Court determined that it was not required to decide between the competing interpretations offered by the parties as it would have been in the absence of the presumption against extraterritorial application.[39] The majority addressed the issue by stating that the language relied upon by the petitioners was ambiguous boilerplate which can be found in any number of congressional acts, none of which was ever held to apply overseas.[40]

The Court explained that the petitioner's reliance on Title VII's jurisdictional provisions had no support in United States case law.[41] The Supreme Court has repeatedly held that even statutes[42]

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33. 42 USC § 2000e-1.

34. For the statutory definition of "commerce," see note 29.

35. *ARAMCO*, 111 S Ct at 1231.

36. Id.

37. Id. Title II of the Civil Rights Act of 1964 defines "commerce" as meaning:

> travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

42 USC § 2000a(c).

38. *ARAMCO*, 111 S Ct at 1231.

39. Id.

40. Id at 1232. The Court cited the following acts as containing "ambiguous boilerplate" language: Consumer Product Safety Act, 15 USC § 2052(a)(12) (1988); Federal Food, Drug, and Cosmetic Act, 21 USC § 321(b) (1988); Transportation Safety Act of 1974, 49 USC App § 1802(1) (1988); Labor-Management Reporting and Disclosure Act, 29 USC § 401 et seq (1988); Americans with Disabilities Act, 42 USC § 12101 et seq (1990).

41. *ARAMCO*, 111 S Ct at 1232.

42. Id. See, for example, *New York Central R. Co. v Chisholm*, 268 US 29 (1925). There the Supreme Court held that it had no jurisdiction under the Federal Employers Liability Act, (hereinafter "FELA"), 45 USC § 51 et seq (1988) for a damages action

which contain broad definitions of "commerce," and which expressly refer to "foreign commerce," do not apply abroad.[43]

The majority found the EEOC's analogy of *Steele v Bulova Watch Co.*[44] unpersuasive.[45] The Court in *Steele* found that, by its terms, the Lanham Act[46] applies to "all commerce which may lawfully be regulated by Congress."[47] Because it was expressly stated that the Act applied to the extent of Congress's constitutional power over commerce,[48] the Court in *Steele* concluded that Congress intended that the Lanham Act was to be applied extraterritorially.[49] Unlike the Court's interpretation of "commerce" in *Steele*, however, Title VII's definition of "commerce" was derived from the Labor Management Reporting and Disclosure Act of 1959.[50]

The Supreme Court held that the petitioner's argument based on the jurisdictional language of Title VII failed based upon statutory language and previous case law.[51] The Court stated that if plausible interpretations of language such as that relied upon by the petitioner were allowed, there would be little left of the pre-

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brought by a United States citizen employed on a United States railroad who suffered fatal injuries at a point thirty miles north of the United States border into Canada, because FELA "contains no words which definitely disclose an intention to give it extraterritorial effect." *Chisholm*, 268 US at 31.

43. *ARAMCO*, 111 S Ct at 1232. Even though the National Labor Relations Act, 29 USC §§ 151-68 (1935) (amended 1947) (hereinafter "the NLRA") contained broad language which referred by its terms to foreign commerce, 29 USC § 152(6), no congressional intent was found applying the NLRA overseas because there was not "any specific language" in the Act reflecting congressional intent to do so. *McCulloch*, 372 US at 17.

44. 344 US 280 (1952). The Supreme Court in *Steele* held that the Lanham Act, 15 USC § 1127 (1946), which was designed to prevent the deceptive and misleading use of trademarks, applied to acts of a United States citizen consummated in Mexico. *Steele*, 344 US 280 (1952).

45. *ARAMCO*, 111 S Ct at 1232.

46. 15 USC § 1127 (1946).

47. *Steele*, 344 US at 288. The Lanham Act's expressed intent is

> to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and unfair competition entered into between the United States and foreign nations.

Id.

48. The Constitution gives Congress the power "to regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes." US Const, Art I, § 8, cl 3.

49. *Steele*, 344 US at 280.

50. *ARAMCO*, 111 S Ct at 1232, citing 29 USC § 401 et seq.

51. *ARAMCO*, 111 S Ct at 1233.

sumption against extraterritorial application of congressional acts.[52]

The petitioner's second argument was based on a negative inference to Title VII's "alien exemption provision."[53] The petitioner argued that because this provision explicitly states that Title VII does not apply to an employer with respect to aliens outside any state, the negative inference should be drawn that Congress intended Title VII to cover United States citizens working abroad for United States employers.[54] The petitioner stressed that there would be no plausible explanation for inclusion of the provision unless Congress had intended Title VII to apply extraterritorially.[55]

The respondents countered this second argument by stating that, because aliens are included in Title VII's definition of an employee and the definition of commerce includes possessions as well as "States," the purpose of the provision is to declare that employers of aliens within the possessions of the United States are not covered by the statute.[56] They asserted therefore that the "outside any State"[57] language contained in the alien exemption provision literally means outside any state, but within the control of the United States.[58] The respondents argued that this interpretation was consistent with the historical development of the alien exemption provision because Congress included the provision as a direct response to the Court's interpretation of the term "possessions" in the Fair Labor Standards Act[59] in *Vermilya-Brown Co. v Connell.*[60] The respondents concluded that the alien exemption provi-

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52. Id.
53. Id. See note 30 for the text of the alien exemption provision.
54. *ARAMCO*, 111 S Ct at 1233.
55. Id.
56. Id.
57. See note 30.
58. *ARAMCO*, 111 S Ct at 1233.
59. 29 USC § 201 et seq (1938).
60. 335 US 377 (1948). *ARAMCO*, 111 S Ct at 1233. In order to determine whether the term "possessions," as used in the Fair Labor Standards Act of 1938, 52 Stat 1060, should be interpreted to include leased bases in foreign nations that were within the control of the United States, the Court in *Vermilya-Brown* held that the Fair Labor Standards Act applied to bases leased by the United States in foreign territory. *Vermilya-Brown*, 335 US at 379. Since the statute does not include or exclude whether Congress intended leased bases to fall within the meaning of the word "possessions," the Court must construe the term as their judgment instructs, and as they believe Congress would have done had they had the present situation in mind at the time of the legislation's enactment. Id at 388. The definition of the reach of the Fair Labor Standards Act covers areas over which the power of Congress extends. Id at 389. Because the Republic of Bermuda would not undertake legisla-

sion was included in Title VII to limit the impact of *Vermilya-Brown* by excluding from coverage employers of aliens in areas under United States control[61] that were not encompassed within Title VII's definition of the term "State."[62] Secondly, respondents asserted that, by negative implication, the exemption protects from discrimination aliens within the United States.[63]

The Court rejected the petitioner's arguments, stating that if the alien exemption clause applies Title VII to employers overseas, there would be no way of distinguishing its application between United States employers and foreign employers.[64] The Court stated that it was unwilling to ascribe to a policy which would raise difficult issues of international law via the imposition of United States employment law upon foreign corporations operating in foreign commerce.[65]

While Title VII consistently speaks in terms of "States" and state proceedings, the Court noted that Title VII failed to mention foreign nations or foreign proceedings.[66] The Court then stated that Congress had failed to provide mechanisms for overseas enforcement and to address the subject of conflicts with foreign laws and proceedings as it did, for example, when it amended the Age Discrimination in Employment Act (hereinafter "the ADEA").[67]

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tion similar to the Fair Labor Standards Act to control labor relations on the base, and because United States citizens would be numerous among employees on the base, the natural legislative impulse would be to give these employees the protections given those of United States territorial possessions. Id.

61. *ARAMCO*, 111 S Ct at 1233-34.

62. The term "State" includes a state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act. 42 USC § 2000e(i) (1988).

63. *ARAMCO*, 111 S Ct at 1234.

64. Id. The Court stated that other elements in the statute suggest a purely domestic focus such as the indication that the statute not unduly interfere with the sovereignty and laws of the states, see 42 USC § 2000h-4), that the EEOC is required to accord substantial weight to findings of state or local authorities in proceedings under state or local law, see 42 USC § 2000e-5, nothing in Title VII shall affect the application of state or local law unless such law requires or permits practices that would be unlawful under Title VII, see 42 USC § 2000e-7, and provisions addressing deferral to state discrimination proceedings, see 42 USC § 2000e-5(c), (d) and (e). Id.

65. *ARAMCO*, 111 S Ct at 1234.

66. Id.

67. Id. Congress specifically addressed potential conflicts with foreign law by providing that it is not unlawful for an employer to take any action prohibited by the ADEA "where such practices involve an employee in a workplace in a foreign country, and compliance with [the ADEA] would cause such employer. . . to violate the laws of the country in which such workplace is located." 29 USC § 623(f)(1) (1969) (amended 1984).

The last issue addressed was an argument by the EEOC that the Court should defer to its "consistent" construction of Title VII.[68] The EEOC stated that its consistent administrative interpretations reinforce the conclusion that Congress intended Title VII to apply extraterritorially.[69]

The Court maintained that the proper amount of deference to be afforded the EEOC was set forth in *General Elec. Co. v Gilbert*.[70] In *Gilbert*, the Court held that the EEOC has no authority to promulgate rules or regulations but that the level of deference afforded "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[71]

The Court held that the EEOC's interpretation of Title VII as to

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68. *ARAMCO*, 111 S Ct at 1235. The EEOC cited its Policy Statement No N-915.033, "[that Title VII] apply to discrimination against American citizens outside the United States." EEOC Compl Man (BNA) § 605:0055 (Apr 1989). The EEOC further cited a 1975 letter from the EEOC's General Counsel which read in part:

> Giving Section [2000e-1] its normal meaning would indicate a Congressional intent to exclude from the coverage of the statute aliens employed by covered employers working in the employers' operations outside of the United States.
>
> The reason for such exclusions is obvious; employment conditions in foreign countries are beyond the control of Congress. The section does not similarly exempt from the provisions of the Act, U.S. citizens employed abroad by U.S. employers. If Section 2000e-1 is to have any meaning at all, therefore, it is necessary to construe it as expressing a Congressional intent to extend the coverage of Title VII to include employment conditions of citizens in overseas operations of domestic corporations at the same time it excludes aliens of the domestic corporation from the operation of the statute.

ARAMCO, 111 S Ct at 1245 (Marshall dissenting), quoting letter from W. Carey, EEOC General Counsel, to Senator Frank Church (Mar 14, 1975).

See also EEOC Dec No 85-16 (Sept 16, 1985), 38 FEP Cases 1889, 1891-1892; EEOC Policy Statement No 125, at 605:005 to 605:0057.

69. *ARAMCO*, 111 S Ct at 1235.

70. 429 US 125 (1976), questioned in *Newport News Shipbuilding & Dry Dock Co. v EEOC*, 462 US 669, 670 (1983), *Shaw v Delta Airlines, Inc.*, 463 US 85, 89 (1983), *California Fed. Sav. & Loan Ass'n*, 479 US 272, 277, 284 (1987). In *Gilbert*, a class action was brought by respondents, challenging the disability plan of petitioner as violative of Title VII of the Civil Rights Act of 1964. *Gilbert*, 429 US at 127, 128. Under the plan petitioner provides nonoccupational sickness and accident benefits to all its employees, but disabilities arising from pregnancy are excluded. Id at 128-29. The district court following trial held that the exclusion constituted sex discrimination in violation of Title VII. Id at 132. The court of appeals affirmed, holding that petitioner's disability benefits plan does not violate Title VII because of its failure to cover pregnancy-related disabilities. Id. The United States Supreme Court held that Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title. Id at 141.

71. *Gilbert*, 429 US at 142, quoting *Skidmore v Swift & Co.*, 323 US 134, 140 (1944).

extraterritorial application has been neither contemporaneous[72] nor consistent[73] since Title VII came into law.[74] The Court found the EEOC interpretation to be insufficient to overcome the presumption against extraterritorial application.[75]

The Court summarized by stating that when Congress desires to do so, it knows how to place the high seas within the jurisdictional reach of a statute,[76] and that Congress knows it must make a clear statement of its intent when a statute is to be applied overseas.[77] The Supreme Court then stated that should Congress wish to do so, it may amend Title VII, calibrating its provisions in a way that the Supreme Court cannot.[78]

The majority concluded that the petitioner failed to present sufficient affirmative evidence that Congress intended Title VII to apply extraterritorially, and therefore affirmed the judgment of the court of appeals.[79]

Justice Scalia, concurring in part and concurring in the judgment,[80] differed with the majority only in the amount of deference to be given to a decision of the EEOC.[81] Justice Scalia differed

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72. *ARAMCO*, 111 S Ct at 1235. The Commission did not reflect in its policy guidelines that Title VII applied abroad until twenty-four years after its passage. Id.

73. Id. The Commission's earlier pronouncements on the issue supported the conclusion that the statute was limited to domestic application. "Title VII . . . protects all individuals, both citizen and noncitizens domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex, or national origin." 29 CFR § 1606.1(c) (1971).

74. *ARAMCO*, 111 S Ct at 1235.

75. Id.

76. Id. See *Argentine Republic v Amerada Hess Shipping Corp.*, 488 US 428, 440 (1989).

77. *ARAMCO*, 111 S Ct at 1235-36. See, for example, The Export Administration Act of 1979, 50 USC App §§ 2401-2420 (1982) (defining "United States person" to include "any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern. . ."); Coast Guard Act, 14 USC § 89(a) (1949) (amended 1950) (Coast Guard searches and seizures upon the high seas); 18 USC § 7 (1952) (criminal code extends to high seas); Smuggling, 19 USC § 1701 (1935) (customs enforcement on the high seas); Comprehensive Anti-Apartheid Act of 1986, 22 USC §§ 5001-5116 (1982) (definition of "national of the United States" as "a natural person who is a citizen of the United States . . ."); Logan Act, 18 USC § 953 (1948) (applying act to "any citizen . . . wherever he may be . . .").

78. *ARAMCO*, 111 S Ct at 1236.

79. Id.

80. Id. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices White, O'Connor, Kennedy, and Souter joined. Justice Scalia filed an opinion concurring in part and concurring in the judgment. Justice Marshall filed a dissenting opinion, in which Justices Blackmun and Stevens joined. Id at 1229.

81. Id.

with the majority's finding that the views of the EEOC are not entitled to the deference normally accorded administrative agencies.[82] The Justice explained that in the most recent case regarding the amount of deference to be accorded to a decision of the EEOC, *EEOC v Commercial Office Prods. Co.*,[83] the Supreme Court said, "the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference."[84] Justice Scalia offered a resolution to this unsettled issue by stating that "deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ."[85] Justice Scalia concluded that because of the presumption against extraterritoriality and the requirement that congressional intent be clearly expressed, it is not reasonable for the Court to give effect to the implications of the statutory language as the EEOC has done.[86]

Justice Marshall, writing the dissent and joined by Justices Blackmun and Stevens, stated that the majority has adopted a "clear statement rule"[87] relieving the majority from its duty to give effect to all other traditional tools of statutory construction used to ascertain congressional intent.[88] Justice Marshall stated that if the majority were to apply the traditional tools of statutory construction, the conclusion is inescapable that Congress intended Title

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82. Id, citing *Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc.*, 467 US 837 (1984).

83. 486 US 107 (1988). At issue before the Court in *Commercial Office Prods.* was whether a state agency's decision to waive its exclusive sixty day period for initial processing of a discrimination charge, pursuant to a work-sharing agreement with the EEOC, "terminates" the agency's proceedings within the meaning of § 706(c) of Title VII, 78 Stat 260, as amended in 1972, 86 Stat 104, 42 USC § 2000e-5(c), so that the EEOC immediately may deem the charge filed. *Commercial Office Prods.*, 486 US at 109-10. The Court held that the state agency's decision to waive § 706(c)'s sixty day period terminates the agency's proceedings within the meaning of § 706(c), so that the EEOC may immediately deem the charge filed and begin to process it. Id at 108. The contention of respondents that the state agency did not "terminate" its proceedings because it retained jurisdiction to act on the EEOC's resolution of the charge was rejected in favor of the EEOC's position that a state agency "terminates" its proceedings when it declares that it will not proceed, if it does so at all, for a specified interval of time, since the interpretation of ambiguous language in the Act by the EEOC "need only be reasonable to be entitled to deference." 486 US at 115.

84. *Commercial Office Prods. Co.*, 486 US at 115.

85. *ARAMCO*, 111 S Ct at 1237.

86. Id.

87. *Foley Bros. v Filardo*, 336 US 281, 291 (1949). An intention to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose. See note 91.

88. *ARAMCO*, 111 S Ct at 1237.

VII to apply extraterritorially.[89]

The dissent contended that the majority has transformed the canon of construction "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States"[90] into a "clear statement rule"[91] allowing the majority to derive meaning from congressional silence on the issue.[92]

The dissent alleged that the majority had incorrectly distorted the canon of construction found in *Foley Bros.*,[93] stating that the range of factors considered by the Court in *Foley Bros.* demonstrated that the presumption against extraterritoriality is not a clear statement rule.[94] The Court in *Foley Bros.* had considered the entire range of conventional sources of statutory construction including legislative history, statutory structure, and administrative interpretations.[95]

The dissent summarily concluded by stating that the majority had transformed the presumption against extraterritoriality, an approach employed to ascertain congressional intent, into a barrier precluding genuine inquiry into the sources that reveal Congress' actual intentions.[96]

The inquiry as to whether Congress has exercised its power to enact legislation with extraterritorial application must, in cases like *ARAMCO*, be determined by statutory interpretation. The United States Constitution grants Congress the power to make "needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[97] Congress' power to regulate the actions of United States citizens outside the territorial jurisdiction of the United States, whether or not the act punished occurred within the territory of a foreign nation, was established initially in *United States v Bowman.*[98] In *Bowman* it was pointed

89. Id.

90. *Foley Bros.*, 336 US at 285.

91. *ARAMCO*, 111 S Ct at 1237. "Clear statement rules operate less to reveal actual congressional intent than to shield important values from an insufficiently strong legislative intent to displace them." Id at 1238. "When they apply, such rules foreclose inquiry into extrinsic guides to interpretation, and even compel courts to select less plausible candidates from within the range of permissible constructions." Id.

92. Id at 1237.

93. Id. See note 23.

94. *ARAMCO*, 111 S Ct at 1238.

95. Id.

96. Id at 1237.

97. US Const, Art IV, § 3, cl 2.

98. 260 US 94 (1922). *Bowman* involved a conspiracy to collect damages from the

out that legislation concerning United States citizens could not offend the dignity or right of sovereignty of another nation.[99]

Subsequently, the Supreme Court decided *Vermilya-Brown Co. v Connell.*[100] The issue presented in *Vermilya-Brown* was the applicability of the Fair Labor Standards Act of 1938[101] (hereinafter "the FLSA") to employees allegedly engaged in commerce or the production of goods for commerce on a leasehold of the United States.[102]

The United States obtained a military base on the island of Bermuda through a lease executed by the British Government.[103] Certain employees of contractors who had work contracts with the United States on the base brought suit under Section 16(b) of the FLSA for recovery of unpaid overtime compensation.[104] The Court held that the FLSA covered the employees even though the leased area was under the sovereignty of Great Britain and not a territory of the United States.[105]

The Court reasoned that since the statute does not state whether Congress intended leased bases to fall within the meaning of the word "possessions," the term must be construed as the Court's judgment instructs and as they believe Congress would have done had Congress had the present situation in mind when enacting the legislation.[106] The Supreme Court held that the FLSA covered areas over which the power of Congress extends by United States sovereignty or by voluntary grant of the authority by the sover-

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United States for the delivery of one thousand gallons of fuel oil. *Bowman*, 260 US at 96. Only six hundred gallons were delivered. Id. The issue before the Court was whether it had jurisdiction since the act occurred while the ship carrying the cargo was on the high seas and therefore out of the territorial jurisdiction of the United States. Id at 96-97. The Court held that criminal statutes do not depend on their locality for governmental jurisdiction, stating that to do so would greatly curtail the scope and usefulness and leave a large area open for fraud. *Bowman*, 260 US at 98.

99. Id at 102. The Court stated that it would not be offensive to the dignity or right of sovereignty of a foreign government to hold United States citizens for crimes committed against the United States.

100. 335 US 377 (1948).

101. See note 60. The Fair Labor Standards Act covers commerce "among the several States or from any State to any place outside thereof." 29 USC § 203(b) (1938). State means "any State or the United States of the District of Columbia or any Territory or possession of the United States." 29 USC § 203(c) (1938).

102. *Vermilya-Brown*, 335 US at 378.

103. Id.

104. Id at 379.

105. Id at 380.

106. Id at 388.

eign.[107] Because the Republic of Bermuda would not undertake legislation similar to the FLSA to control labor relations on the base, and because United States citizens would be numerous among employees on the base, the natural legislative impulse would be to give these employees the same protections that were given those similarly employed on United States territorial possessions.[108]

Three months after the decision in *Vermilya-Brown*, the Court decided *Foley Bros. v Filardo*.[109] The issue in *Foley Bros.* was "whether the Eight Hour Law[110] should be applied to a construction contract between the United States and a private contractor for work to be performed in a foreign country."[111] The case involved an employment contract executed in Iraq and Iran between the respondent, an American citizen employed by the petitioner, an American corporation.[112] The text of the employment contract stated that the petitioner agreed to "obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America."[113] The respondent frequently worked more than eight hours a day and was refused compensation for overtime under this contract.[114] The Court held that the Eight Hour Law was not applicable to work done under this contract.[115] The Court reasoned that neither the textual language nor the legislative history of the Eight Hour Law indicated a congressional purpose to extend the law's coverage beyond places over which the United States has sovereignty or some measure of control.[116]

In 1957 the Court handed down its decision in *Benz v Compania Naviera Hidalgo, S.A.*[117] *Benz* involved the extraterritorial application and interpretation of the Labor Management Relations Act of 1947.[118] A labor dispute developed between the owners of a foreign vessel and its seamen, all of whom were foreign.[119] These

107. Id at 381.
108. Id.
109. *Foley Bros.*, 336 US 281 (1949).
110. 40 USC § 324. See note 23.
111. *Foley Bros.*, 336 US at 282.
112. Id at 283.
113. Id.
114. Id.
115. Id at 290.
116. Id at 285-86.
117. 353 US 138 (1957).
118. 29 USC § 141.
119. *Benz*, 353 US at 139.

seamen went on strike while in an American port[120] and, with the assistance and support of American unions, sought a remedy under the Labor Management Relations Act.[121]

The Court held that because foreign applicability was not specified, an intent to change the contractual provisions between the foreign shipowner and the foreign seamen could not be read into the Labor Management Relations Act.[122] The Court here stated that foreign applicability would interfere with the "delicate field of international relations,"[123] and declared that only Congress "has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliatory action so certain."[124] The Court concluded that, because of the concern with possible interference in the field of international relations, the affirmative intent of Congress must be clearly expressed.[125]

Subsequently, the Court decided *McCulloch v Sociedad Nacional de Marineros de Honduras*.[126] *McCulloch* involved a United States corporation that beneficially owned vessels which regularly sailed between the United States, Latin America, and other ports, transporting the corporation's products and other supplies.[127] Each ship was legally owned by a foreign subsidiary of the American corporation.[128] Members of the crews of those vessels, although already represented by a foreign union, sought representative elections from the National Labor Relations Board (hereinafter "the Board").[129] The Board held that the National Labor Relations Act (hereinafter "the NLRA")[130] extended to the crew members of these vessels and ordered the elections.[131] That action brought vigorous protests from foreign governments and created international problems for the United States government.[132] The Court was faced with the issue of whether the jurisdictional provisions of the NLRA extended to the maritime operations of foreign-flagged

120. Id.
121. Id at 140.
122. Id at 146-47.
123. Id at 147.
124. Id.
125. Id.
126. 372 US 10 (1963).
127. *McCulloch*, 372 US at 12.
128. Id.
129. Id.
130. 29 USC §§ 151-168 (1988).
131. *McCulloch*, 372 US at 12.
132. Id at 16-17.

ships owned by foreign subsidiaries of American corporations employing alien seamen.[133]

The Court found that there was no specific language in the NLRA itself or in the legislative history that reflected a congressional intent to include a foreign-flagged vessel within the NLRA's coverage.[134] The Court stated that, in international law, "the law of the flag state ordinarily governs the internal affairs of a ship."[135] The Court held that even though the NLRA contained broad language that referred by its terms to foreign commerce, there was no congressional intent to apply the statute abroad because there was no specific language in the NLRA reflecting a congressional intent to do so.[136] As was the case in *Benz*,[137] the Court in *McCulloch*[138] based its decision upon a concern for international comity and held that the Board was without jurisdiction to order the election.[139]

On December 4, 1980, the United States District Court in the District of New Jersey decided *Bryant v International Schools Servs., Inc.*,[140] holding that Title VII has extraterritorial effect and is applicable to the employment practices of an American corporation employing United States citizens in Iran.[141] In *Bryant*, two American citizens were employed by International Schools Services, Inc. (hereinafter "ISS"), an American corporation,[142] as teachers. The employees had instituted suit under Title VII charging that the practice of ISS of awarding two distinct employment contracts, which offered substantially different rates of compensation and benefits, unlawfully discriminated against plaintiffs on the basis of sex.[143]

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133. Id at 17.
134. Id at 19-20.
135. Id at 21, citing *Wildenhus's Case*, 120 US 1 (1887).
136. *McCullough*, 372 US at 19.
137. See note 25.
138. Id.
139. *McCulloch*, 372 US at 22.
140. 502 F Supp 472 (1980).
141. *Bryant*, 502 F Supp at 482.
142. Id at 472. ISS is a private, non-profit corporation organized under the laws of the District of Columbia and works by contract with overseas governments or corporations to operate schools for children of American employees overseas. Id.
143. Id. Regardless of the kind of contract, the duties of the teachers did not differ. The first type of contract was termed a "local hire" contract. The second type of contract was termed an "ISS-sponsored" contract. Persons under the ISS-sponsored contract received additional allowances such as 25% increase in base salary, transportation costs, relocation allowances, housing allowances, annual round-trip airfare to the United States, and others. If a person was hired in the United States to work in Iran, that person received the ISS-sponsored contract. If a person was hired in Iran, that person received a local hire con-

The *Bryant* Court, relying on the negative implications of the alien exemption provision of Title VII, determined that the issue of whether an Act applies extraterritorially was a matter of statutory construction.[144] The Court cited a footnote in *Love v Pullman*,[145] which stated that,

> Since Congress explicitly excluded aliens employed outside of any state, it must have intended to provide relief to American citizens employed outside of any state in an industry affecting commerce by an employer otherwise covered under the act. . . . An additional support for this interpretation comes from the international or extraterritorial application of the anti-trust laws.[146]

Bryant was reversed on appeal and the Third Circuit expressly declined to reach the question of extraterritorial application of Title VII, stating that it was unnecessary to do so.[147]

Following the decision in *Bryant* was *Seville v Martin Marietta Corp.*[148] In *Seville*, four female clerical employees challenged defendant Martin Marietta's policy of paying certain fringe benefits[149] to its "technical"[150] employees but not to its "clerical"[151] employees at defendant's facility in Frankfurt, West Germany. The stated purpose of the policy was "to compensate employees for extraordinary and additional expenses incurred while on non-domestic assignments."[152] All clerical employees were hired from a local pool of United States citizens.[153]

Defendant Martin Marietta challenged the Court's jurisdiction

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tract. Id. The plaintiffs in this case were both local hires who had travelled to Iran with their husbands who were employed by Grumann Aerospace and Bell Helicopter. Id at 474.

144. Id at 482. See 42 USC § 2000e-1.

145. 12 Empl Prac Dec 11,225 (D Colo 1976).

146. *Bryant*, 502 F Supp at 482-83, quoting *Love v Pullman*, 12 Empl Prac Dec 11, 225 (D Colo 1976).

147. *Bryant v International Schools Servs., Inc.*, 675 F2d 562 (3d Cir 1982).

148. 638 F Supp 590 (D Md 1986).

149. *Seville*, 638 F Supp at 591. The benefits provided to technical employees but not to clerical employees included: (1) foreign service premium of 15% of base wage; (2) per diem allowance for cost of living overseas; (3) housing expenses; (4) reimbursement of moving and travel expenses to and from the United States and the foreign facility; (5) annual and emergency home leave; and (6) educational allowance for employee dependents. Id at 592.

150. Id. The technical workers provided mechanical and electrical repairs and were additionally responsible for quality control and site support. Id.

151. Id. The clerical workers were secretaries to the Site Manager and the Contract Officer's Representative, librarians and statisticians. Their responsibilities were limited to administrative tasks. Id.

152. Id.

153. Id.

of the case, contending that Title VII was not intended to apply extraterritorially.[154] The Court in *Seville* denied that challenge and expressly adopted the decisions of *Bryant* and *Love*, holding that the alien exemption provision brings United States citizens employed by United States corporations outside of the territory of the United States within the protections of Title VII.[155]

Finally, on June 7, 1990, the United States District Court for the Western District of Washington decided the case of *Akgun v Boeing Co.*[156] Defendant Boeing provided support and maintenance services to the United States government at various military bases in Turkey.[157] Both plaintiffs were married to Turkish nationals and resided in Turkey at the time of their initial employment.[158] The plaintiffs were originally treated by Boeing as members of the "civilian component" of the United States forces stationed in Turkey, and therefore entitled to various privileges under the North Atlantic Treaty-Status of Forces Agreement, (hereinafter "the NATO-SOFA").[159] These privileges included payment in United States currency, exemption from Turkish taxes and duties, and certain United States Air Force base privileges.[160]

In 1982 Boeing informed plaintiffs that they would no longer be considered part of the civilian component because of Boeing's reading of NATO-SOFA and Turkish law.[161] Plaintiffs' new contract placed them on the Turkish lira payroll and Turkish taxes were withheld.[162] Plaintiffs filed a charge of discrimination with the EEOC and filed an action in the district court.[163] The defendant filed a motion to dismiss, contending that Title VII does not

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154. Id at 591.

155. Id at 592. The Court stated, "These decisions are soundly reasoned and this Court adopts their logic. Accordingly, Martin Marietta's jurisdictional challenge is denied." Id.

156. 1990 US Dist LEXIS 11845, *1 (W D Wash).

157. *Akgun*, 1990 US Dist LEXIS at *1.

158. Id at *2.

159. Id. The NATO-SOFA is found at 4 UST 1972, TIAS No 2846.

160. *Akgun*, US Dist LEXIS at *2.

161. Id. Turkish law requires that the domicile of a married woman is the domicile of her husband. NATO-SOFA defines the civilian component as "[T]he civilian personnel accompanying a Force of a Contracting Party who are in the employ of an armed service of the Contracting party and who are not stateless persons, not nationals of any State which is not a party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in which the Force is located." Therefore, because plaintiffs were not ordinarily resident in Turkey because they were married to Turkish men, they were removed from the civilian component and rehired under Turkish contracts. Id.

162. Id at *3.

163. Id at *4.

apply extraterritorially.[164] The motion was denied.[165]

It is significant that *Akgun* was decided after the Fifth Circuit Court decided *Boureslan*.[166] The Court in *Akgun* expressly held contrary to the Court in *Boureslan*.[167] The Court in *Akgun* based its decision on two reasons: (1) the presumption against extraterritorial application of statutes does not require an affirmative expression of congressional intent before an act will be considered as violating international law;[168] and (2) congressional intent is supplied by the alien exemption provision,[169] legislative history,[170] and the amendments to the ADEA.[171] The Court distinguished the presumption against extraterritorial application of a statute from the presumption that Congress did not intend to violate international law,[172] holding that an affirmative expression of intent is required only if a statute violates international law.[173]

In locating congressional intent, the Court first looked to the alien exemption provisions.[174] The Court agreed with Judge King's dissent in *Boureslan*,[175] which stated that "if no individual were intended to be covered extraterritorially by Title VII, a specific provision excluding only aliens would be superfluous."[176] The Court regarded as redundant the argument that the intent of the exemption was to include aliens within the United States, determining that aliens were already covered by the definition of "employee" as an individual.[177]

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164. Id.
165. Id at *11.
166. Id at *5.
167. Id.
168. Id at *6.
169. 42 USC § 2000e-1. See note 30.
170. See note 188 and accompanying text.
171. See note 67.
172. *Akgun*, 1990 US Dist LEXIS at *6.
173. Id.
174. 42 USC 2000e-1. See also note 30.
175. *Boureslan v ARAMCO, Arabian American Oil Co. and ARAMCO Serv. Co.*, 892 F2d 1271, 1275 (1990).
176. *ARAMCO*, 892 F2d at 1275.
177. Id. See 42 USC § 2000e(f).

> The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a state government, governmental agency or political subdivision.

The Court also sided with Judge King's dissent in *Boureslan* that evidence of congressional intent may be found in the legislative record, where it was stated that "the intent of the [alien] exemption is to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise."[178] The Court thus found that Congress would have no concern over conflicts of laws unless Title VII was intended to apply extraterritorially.[179]

Finally, the Court noted that a 1984 amendment to the ADEA,[180] designed to extend ADEA coverage to United States citizens working in foreign countries, was introduced to bring the statute into conformity with Title VII.[181] The purpose of the amendment was determined to be to repair the anomaly of having Title VII apply abroad while the ADEA, an enactment with similar legislative goals, only applied domestically.[182]

The Court's decision in *ARAMCO* is a most ironic one. On the very day that *ARAMCO* was argued before the Supreme Court, January 16, 1991, United States military forces, including an unprecedented number of women and minorities based in Saudi Arabia and the Middle East, launched operation "Desert Storm," a campaign that would eventually free Kuwait from Saddam Hussein and the nation of Iraq.[183] While President George Bush and his administration had made known its adoption of international law as the foundation for United States foreign policy, the Supreme Court was rejecting international law in favor of an isolationist presumption that United States concerns end at the water's edge.[184]

The district court was unique in dismissing Boureslan's claim as every other lower federal court that had considered the issue had held that Title VII does apply to a United States company's discrimination abroad against an employed United States citizen.[185]

Id.

178. *Akgun*, 1990 US Dist LEXIS at *6, citing *Boureslan*, 892 F 2d at 1276 (King dissenting), citing Hearing on HR 7152, 88th Cong, 1st Sess, 2303 (1963).

179. *Akgun*, 1990 US Dist LEXIS at *6.

180. 29 USC § 621 et seq.

181. *Akgun*, 1990 US Dist LEXIS at *10.

182. Id.

183. Gary Born and W. Hardy Callcott, *When Basic Rights Stop at the Border*, Legal Times 26, 27 (May 27, 1991).

184. Born and Callcott, Legal Times at 26 (cited in note 183).

185. See *Bryant v International Schools Servs., Inc.*, 502 F Supp 472 (D NJ 1980),

By this decision, the Court has now allowed United States employers to discriminate against United States workers in the most outrageous manner, as long as they wait until their victims pass through customs.[186]

The evidence that Congress intended Title VII to apply extraterritorially is compelling. By its broad jurisdictional terms, Title VII covers businesses engaged not just in interstate commerce, but also in commerce "between a State and any place outside thereof."[187] The legislative history of Title VII cites cases upholding Congress' authority to regulate commerce to the full extent permitted by the Constitution.

The inference that Congress intended Title VII to apply overseas is further drawn from the fact that Title VII specifically excludes from its protection aliens employed abroad.[188] The legislative record contains the following statement regarding this exemption: "The intent of the [alien] exemption [clause] is to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise."[189] Also, while Title VII was being considered, both Congress and President Kennedy emphasized the important role it would play in domestic as well as international policies.[190] The last case where the pre-

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rev'd on other grounds, 675 F2d 562 (3d Cir 1982); *Love v Pullman*, 13 FEP 423 (D Colo 1976), aff'd on other grounds, 569 F 2d 1074 (10th Cir 1978); *Seville v Martin Marietta Corp.*, 638 F Supp 590 (D Md 1986); *Akgun v Boeing Co.*, 53 Empl Prac Dec (W D Wash 1990). In all of these cases the courts concluded that the alien exemption provision reflects an intention to provide American citizens with protection from employment discrimination abroad.

186. Born and Callcott, Legal Times at 26 (cited in note 183).

187. 42 USC § 2000(e)(g).

188. In section 4 . . . a limited exception is provided for employers with respect to employment of aliens outside of any State. . . . The intent of [this] exemption is to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise.

HR Rep No 570, 88th Cong, 1st Sess 4 (1963), reprinted in Civil Rights, Hearings on HR 7152, as amended, before Subcommittee No 5 of the Committee on the Judiciary, 88th Cong, 1st Sess 2303 (Civil Rights Hearings).

189. Civil rights: Hearing on HR 7152 before the House Committee on the Judiciary, 88th Cong 1st Sess 2393 (1963) (testimony of Representative Roosevelt explaining provisions of HR 405 which was incorporated into Title VII of HR 7152).

190. In calling for passage of the civil rights legislation that became the Civil Rights Act of 1964, President Kennedy stated: "In this year of the emancipation centennial, justice requires us to insure the blessings of liberty for all Americans and their posterity — not merely for reasons of economic efficiency, world diplomacy, and domestic tranquility — but, above all, because it is right." Special Message to Congress by the President June 19, 1963

sumption against extraterritoriality was applied was in *Foley Bros. v Filardo*.[191] In *Foley Bros.*, the extraterritoriality presumption was applied only because there was no evidence whatsoever of congressional intent.[192] The Court's claimed finding of the clear-statement requirement in *McCulloch* did not involve extraterritoriality.[193] Rather, *McCulloch* involved a statute which was shown to protect only United States workers, not foreign workers.[194]

Under international law, the ability of a state to prescribe[195] or make applicable its laws is based upon a two-part test. Section 401(a) of the Restatement (Third) of Foreign Relations Law of the United States provides that in order to determine the legitimacy of exercising extraterritorial jurisdiction, there must be a jurisdictional basis to prescribe and, secondly, the assertion of jurisdiction must not be unreasonable. The jurisdictional basis for applying Title VII extraterritorially to the instant case may be found in the internationally accepted principle of nationality jurisdiction to prescribe, which provides that "a state has jurisdiction to prescribe law with nationals outside as well as within its territory."[196] This basis of jurisdiction applies to juridical persons including corporations.[197] A corporation's nationality is that of the state under whose law it is organized.[198]

Both ARAMCO and Boureslan are citizens of the United States and have substantial connections with the United States. Combined with the lack of any countervailing Saudi laws calling for application of United States laws under choice-of-law principles, the assertion of jurisdiction by the United States under the nationality principle would not have been unreasonable and the result should have been apparent.

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in 109 Cong Rec 1055, 1063.

Furthermore, the House reports on the 1964 Civil Rights Act urged that the bill was necessary to combat totalitarian regimes abroad, as well as to preserve the global competitive position of the United States and present an example to newly emerging nations. HR Rep No 1370, 87th Cong, 2d Sess at 3 (1962).

191. See notes 23, 109 and accompanying text.

192. *Foley Bros.*, 336 US 281, 286 (1949).

193. *McCulloch*, 372 US at 21.

194. Id at 13. See note 126 and accompanying text.

195. Prescriptive jurisdiction is defined as jurisdiction of a state to "make its laws applicable to the activities, relations, or status of persons, or the interests of persons in things whether by legislative action, by executive act or order, by administrative rule or regulation, or by determination by a court." Restatement (Third) of Foreign Relations Law § 401(a) (1987).

196. Restatement (Third) of Foreign Relations Law § 402(2) (1987).

197. Restatment (Third) of Foreign Relations Law § 402(2), comment e (1987).

198. Id.

The millions of United States citizens employed by United States employers overseas now suddenly realize that they are without the protections of Title VII and other untold federal laws. In fact, the rigidity of this rule of territoriality may not provide a remedy for discrimination on even brief business trips.

Finally, the majority in *ARAMCO* noted with interest the 1984 amendment to the ADEA.[199] The amendment provided that the ADEA would now apply abroad.[200] Interestingly, the purpose of the 1984 amendment was to correct the anomaly of having Title VII apply abroad while the ADEA, with similar legislative goals, was only applied domestically. It is clear from the legislative history of this amendment that Congress believed Title VII was intended to apply extraterritorially.

ARAMCO may have numerous effects on other areas of law. In the war on drugs, it had been routine to apply United States narcotics laws to smuggling activities that occur on foreign soil but are directed at the United States, even though many federal drug laws contain no "clear statement" that Congress intended such application.[201] Also, the well-developed principles concerning the extraterritorial application of the antitrust laws could well be obsolete.

On June 11, 1991, House of Representatives Bill 1 was introduced.[202] This bill was entitled the Civil Rights Restoration Act of

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199. 29 USC § 621 et seq.

200. *EEOC v Arabian Am. Oil Co.*, 111 S Ct 1227, 1234 (1991).

201. Born and Callcott, Legal Times at 26 (cited in note 183).

202. HR 1, 102nd Cong, 1st Sess (June 11, 1991).

SEC. 119. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

(a) DEFINITION OF EMPLOYEE.-Section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f)) is amended by adding at the end the following:
"With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.".

(b) EXEMPTION.-Section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) is amended-
(1) by inserting "(a)" after "SEC. 702.", and
(2) by adding at the end the following:
"(b) It shall not be unlawful under section 703 or 704 for an employer (or a corporation controlled by an employer) labor organization, employment agency, or joint management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.
"(c)(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 703 or 704 engaged in by such corporation shall be presumed to be engaged in by such employer.

1991. Section 119 of that bill provides for an amendment to the definition of employee in 42 USC § 2000e(f). By this bill, the House includes in the definition of employee a United States citizen working in a foreign country. The House further clarified the meaning of the alien exemption clause by stating that the section would not apply if it were to violate the laws of the foreign government.

These reactions of Congress to the *ARAMCO* decision indicate that it is likely to be swiftly overturned.

Carl Zacharia

"(2) Sections 703 and 704 shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

"(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on-

"(A) the interrelation of operations;

"(B) the common management;

"(C) the centralized control of labor relations; and

"(D) the common ownership or financial control; of the employer and the corporation."

(c) APPLICATION OF AMENDMENTS.-The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

HR 1, 102d Cong, 1st Sess (June 11, 1991).